Donald A. Drisdell
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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

February 28, 2011

Robert W. Healy
City Manager
City Hall
Cambridge, MA 02139

Re: Awaiting Report No. 11-21 re: Report on the Feasibility of Instituting a Phone Book Opt-out / Opt-in Program

Dear Mr. Healy:

The above referenced Awaiting Report requested the City Manager "to inquire into the feasibility of instituting a phone book opt-out / opt-in program in Cambridge to reduce waste and the costs associated with that waste" and "to report back to the City Council on this matter including bylaws or ordinances that some municipalities have enacted and a model bylaw available from the Product Stewardship Institute." Council Order No. O-5 dated February 5, 2010 similarly requested the City Manager "to consult with the Law Department as to the development of an ordinance that would limit the distribution of telephone books to those who request them." In our March 30, 2010 response to the latter Order, a copy of which is attached hereto, we advised that an ordinance which preconditions delivery of unsolicited protected speech on the express consent of a targeted audience will likely be found by a court to violate the U.S. Constitution's First Amendment. We continue to believe that proceeding with an ordinance in this area will likely be found by a court to violate the First Amendment.

We have researched the question of whether there are any other Massachusetts communities that have enacted an ordinance regulating the distribution of telephone books, and have been unable to identify any such ordinances enacted in Massachusetts. As requested by the Council's Order, we have been in contact with the Product Stewardship Institute ("PSI") and confirmed that it shares this office's understanding that there are no other Massachusetts communities that have adopted such an ordinance.

PSI does provide advice to municipalities interested in regulating the distribution of telephone books. In fact, PSI stated that it provided advice to the City of Seattle in its

development and promulgation of a telephone book distribution ordinance. Shortly after Seattle adopted the measure, however, a trade group of telephone book distributors filed suit in federal court challenging Seattle's ordinance under federal law. As we had anticipated in our March 30, 2010 Council Order response, the telephone book distributors have challenged the Seattle ordinance on First Amendment grounds. That case is presently pending in federal court, and cross-motions for summary judgment have been filed and are awaiting hearing.

We believe knowing how the federal court rules on Seattle's ordinance would be of great assistance to us in advising the Council in how to proceed.

Sincerely,

Donald A. Drisdell
City Solicitor

Enclosure

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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

March 30, 2010

Robert W. Healy
City Manager
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: Awaiting Report No. 10-11 – Report on Developing and Ordinance to Limit Distribution of Telephone Books and Unsolicited Free Newspapers

Dear Mr. Healy:

Council Order O-5 dated February 5, 2010, requested the City Manager "to consult with the Law Department as to the development of an ordinance that would limit the distribution of telephone books to those who request them." In doing so, the Law Department was to "look to other communities that have successfully developed ordinances which address the issue." The order requested that this "report also include information on whether the distribution of unsolicited free newspapers can be similarly limited without violating the Constitution."

1. Telephone books are protected under the first amendment as commercial speech.

It is now well–settled that the First Amendment protects commercial speech from unwarranted governmental regulation, since commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. See Wooster, Ann K., 164 A.L.R. Fed. 1, Protection of Commercial Speech Under First Amendment—Supreme Court Cases (2000); see also Rhode Island Assoc. of Realtors v. Whitehouse, 51 F. Supp.2d 107, 113 (1999). ("Commercial solicitation is a form of commercial speech protected by the First Amendment.")

Telephone books would likely be deemed by a court to be protected commercial speech under the First Amendment. See Virginia State Board of Pharmacy v. Virginia

Citizens Consumer Council, 425 U.S. 748, 762-63 (1976) ("Purely factual matter of public interest may claim protection... As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.") Justice Blackmun in writing the opinion for the Court ruled that:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. Id. at 765.[1]

For regulation of commercial speech to be valid under the First Amendment, the courts employ a four-part test derived from Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 564 (1980). First, there is an analysis to determine whether the expression is constitutionally protected—for commercial speech to receive such protection, "it at least must concern lawful activity and not be misleading." See Greater New Orleans Broadcasting Ass'n., Inc. v. U.S., 527 U.S. 173, 183 (1999). Second, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real; the government interest must be substantial. Id. at 188. Third, the regulation must directly advance the governmental interest asserted. ("...regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.") Id. Finally, the regulation must not be more extensive than is necessary to serve that interest. Id. ("In establishing that the challenged commercial speech restriction is not more extensive than necessary to serve the interests that support it, the government is not required to employ the least restrictive means conceivable, but it must demonstrate a narrow tailoring of the challenged regulation to the asserted interest, a fit that represents not necessarily the single best disposition, but one whose scope is in proportion to the interest served." Id.)[2]

As to a city's interest in regulating First Amendment protected speech, the Supreme Court has held that the prevention of littering is an insufficient justification for an infringement on individuals' First Amendment rights. See Schneider v. Irvington, 308 U.S. 147, 160 (1939). Courts have also rejected a city's interest in aesthetics justifying a ban on door-to-door newspaper delivery. Id. at 151; see also North Jersey Newspapers Co. v. Kenilworth, 254 N.J.Super. 166, 170 (1991) ("the State's anti-littering interest has been held to yield to the disseminator's invocation of the First Amendment"); see also Miller v.

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[1] "Purely factual matter of public interest may claim protection." See Bigelow v. Virginia, 421 U.S. 809, 822 (1975). "In short, such speech serves individual and societal interests in assuring informed and reliable decision-making." See FTC v. Procter & Gamble Co., 386 U.S. 568, 603-604 (1967).

[2] A government regulation of the distribution of First Amendment speech can also be analyzed as a time, place and manner restriction, so long as it is content-neutral. See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) ("Discovery Network"). ("The Court has held that government may impose reasonable restrictions on the time, place, or manner of engaging in protected speech provided that they are adequately justified without reference to the content of the regulated speech.") Id. at 428. In Discovery Network, the City of Cincinnati's regulation banning commercial news racks was not content-neutral because e ban required reference to the content (commercial advertisements) of the regulated speech). Id.

Laramie, 880 P.2d 594, 598 (Wyo. 1994) ("the minor burden of receiving [a] paper [i]s indisputably outweighed by the publisher's free speech and...the justifications for restrictions upon distribution (finding a few papers in a driveway, on a sidewalk or street) which resulted in violation of the ordinance were not reasonable").

2. First amendment includes the right to distribute commercial (phonebooks) and non-commercial (newspapers) speech.

There have been no court decisions analyzing a government's ban on the unsolicited delivery of phonebooks. However, there is legal precedent suggesting that the First Amendment is violated when a city prohibits the distribution of First Amendment materials absent consent from the targeted audience. Because newspapers and phonebooks are protected speech under the First Amendment, this principle applies to each.

Liberty of circulating is as essential to freedom of speech and press as liberty of publishing; indeed, without the circulation, the publication would be of little value. See Lovell v. City of Griffin, 303 U.S. 444, 452 (1937); see also Schneider v. State, 308 U.S. 147, 164 (1939) ("perhaps the most effective way of bringing [pamphlets] to the notice of individuals is their distribution at the homes of people.") In Martin v. City of Struthers, 319 U.S. 141, 145-146 (1943), the Supreme Court developed the significant role fulfilled by house-to-house distribution of ideas.

> The widespread use of this method of communication by many groups espousing various causes attests to its major importance...Many of our most widely established religious organizations have use this method of disseminating their doctrines, and laboring groups have used it in recruiting their members...Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to poorly financed causes of little people. Id.

The Martin court said "[t]raditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off...We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters property of another for an innocent purpose without an explicit command of the owner to stay away." Id. at 147-148. In invalidating the ordinance, the Martin court made clear that the provision's principal vice lay in its prohibition of communication when there had been no objection voiced by the householder. Id. at 147-148. Finding this right to disseminate information door to door substantially impaired by a local ordinance which forbade distributors of literature from ringing doorbells or sounding door knockers, the Martin court invalidated the provision as incompatible with the First Amendment. In March v. Alabama, 326 U.S. 501, 505 (1946), the Supreme Court characterized its decision in Martin as holding broadly that "the preservation of a free society is so far dependent upon the right of each individual citizen to receive such

literature as he himself might desire that a municipality could not, without jeopardizing that vital individual freedom, prohibit door to door distribution of literature."

In Van Nuys Publishing Company, Inc. v. City of Thousand Oaks, 489 P.2d 809 (1971) the Supreme Court of California citing these cases struck down a municipal ordinance which prohibited distribution of protected literature absent "the prior consent of the occupant of the property where distribution is to take place." The Court held that "house-to-house distribution of written material constitutes one of the principal means of implementing the First Amendment right of communication, and historically have afforded constitutional protection to such distribution." Id.

The City argued that an individual may have a constitutional right to distribute material to willing recipients; he has no right to force his ideas on unwilling recipients. Id. at 825. The Court agreed citing the Supreme Court's decision in Rowan v. Post Office Department, 397 U.S. 728, 737 (1970). There the Supreme Court recognized the important interest in allowing addressees to give notice to a mailer that they wish no further mailings. Id. at 737. In Rowan, the Supreme Court held that the addressee's rights are absolute and "unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents-or indeed the text of the language touting the merchandise." See Rowan, 397 U.S., at 737. However, the Van Nuys Publishing court pointed out that the "principal vice of the instant ordinance is that it withdraws, as a matter of municipal policy, the possibility of communication between a distributor and those willing recipients who are not present to give personal consent to the delivery of distributed literature." Id.

The court in Van Nuys Publishing held that the municipality's ordinance went considerably beyond "preserving the homeowner's individual choice, since it prohibits distribution to those occupants who have raised no objection to the material as well as to those who have. Instead of merely protecting the "unwilling listener" as the city contends, the present ordinance thus impairs a distributor's opportunity to win the attention of all uncommitted listeners. Id. at 826.

The California Supreme Court ruled that the city's professed goal of protecting "unwilling listeners" could be equally served by a narrowly drawn provision, which simply prohibited a distributor from delivering material to any occupant who had expressed an objection to such distribution. Id. Such an ordinance, placing the initial burden on the homeowner instead of the distributor, would not, in effect, destroy First Amendment rights. Id.

In Martin the Supreme Court held that "[t]o preserve a homeowner's control over his "castle," a city may certainly prohibit a distributor from delivering matter in defiance of the previously expressed will of the occupant. Martin, 319 U.S. at 148. The Van Nuys court suggested that a

> homeowner can, of course, express his objection to distribution in a variety of ways: he might, for example, post a sign on his property or, in the case of "regular" distributors, write or telephone the disseminator to instruct him to discontinue delivery. Alternatively, the city might adopt the

Rowan procedure as a model, and establish a municipal office both to channel complaints to offending distributors and to monitor distributors' responses. The choice of method, of course, remains with each municipality. See Van Nuys, 489 P.2d at 827.

3. Measures seeking to regulate the distribution of unsolicited phonebooks in other communities.

No Massachusetts community has enacted a ban on the delivery of unsolicited phonebooks. The City of Boston currently has before it a measure introduced by Councilor LaMattina in March, 2008. See Tania deLuzuriaga, City Councilor Seeks to Ban Phone Book Clutter, Boston Globe, Mar. 19, 2008. A few communities have enacted bans specifically related to phonebooks—(City of Middleton, Wisconsin--October 6, 2009), and the City of Albany, NY--January 22, 2009). The Albany Ordinance is an "opt-out" measure, meaning that the regulation allows unsolicited delivery but requires conspicuous notice about how a resident can "opt-out" of service, either by directly contacting the phonebook publisher or by visiting a "clearinghouse" website.[3] Attached to this opinion are proposed pieces of legislation from a number of other states.

4. Conclusion.

An ordinance which preconditions delivery of unsolicited protected speech on the express consent of a targeted audience will likely be found by a court to violate the U.S. Constitution's First Amendment. Newspapers are traditionally recognized as having free speech protections; however, phonebooks would likely also be afforded similar protection under the First Amendment because they contain commercial speech that the Supreme Court has recognized as necessary for the free flow of information in a free, market-based economy. The Supreme Court has also recognized that distribution of speech is inherent in First Amendment protections. Restrictions which prohibit the recipient of unsolicited First Amendment speech from hearing that speech will likely run afoul of the right to distribution protections of the First Amendment.

Very truly yours,

Donald A. Drisdell
City Solicitor

[3] Additionally, www.yellowpages.com allows residents to notify all of the publishers in a specific postal zip code area to cease delivery of unsolicited phonebooks.